

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:) No. 18 C 864
)
DEALER MANAGEMENT SYSTEMS) Chicago, Illinois
ANTITRUST LITIGATION.) June 10, 2019
) 9:35 A.M.

TRANSCRIPT OF PROCEEDINGS - Status and Motions
BEFORE THE HONORABLE JEFFREY T. GILBERT, Magistrate Judge.

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5
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(Appearing telephonically)

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1 (Proceedings had in open court.)

2 THE COURT: Sorry, everybody.

3 I know Ms. Gulley is on the phone too, so we will get
4 everybody's appearances. Just give me one second.

5 Okay. We'll call the case and get the appearances and
6 start rolling here.

7 THE CLERK: 18 C 864, In Re: Dealer Management
8 Systems Antitrust Litigation, for status and motion hearing.

9 THE COURT: Okay. Good morning. Plaintiffs first and
10 then defendants.

11 MS. WEDGWORTH: Good morning, your Honor. On behalf
12 of dealership class plaintiffs, Peggy Wedgworth for Miller
13 Tadler Phillips Grossman.

14 MR. HO: Good morning, your Honor. Derek Ho from
15 Kellogg, Hansen on behalf of the individual and vendor class
16 plaintiffs.

17 MR. NEMELKA: Good morning, your Honor. Mike Nemelka
18 from Kellogg, Hansen on behalf of the individual and vendor
19 class.

20 MR. RICHTER: Good morning, your Honor. Frank Richter
21 from Robbins Geller dealership class plaintiffs steering
22 committee.

23 THE COURT: Dealership class plaintiffs steering
24 committee.

25 And how is that different than Ms. Wedgworth?

1 MS. RICHTER: Ms. Wedgworth is lead counsel for the
2 dealership class.

3 THE COURT: Okay. Back row.

4 MR. MacDONALD: Good morning, your Honor. Ross
5 MacDonald of Gibbs & Bruns for defendants Reynolds and Reynolds
6 Company.

7 MR. ROSS: Good morning, your Honor. Brian Ross also
8 from Gibbs & Bruns on behalf of the Reynolds and Reynolds
9 Company.

10 MS. MILLER: Good morning, your Honor. Britt Miller,
11 Mayer Brown, LLP, on behalf of CDK Global, LLC, and
12 Computerized Vehicle Registration.

13 MR. PROVANCE: Good morning, your Honor. Matt
14 Provance also with Mayer Brown for CDK Global and Computerized
15 Vehicle Registration.

16 THE COURT: And on the phone we have?

17 MS. GULLEY: Good morning, your Honor. This is Andi
18 Gulley for the Reynolds and Reynolds Company.

19 THE COURT: Thank you.

20 I'm sorry, Ms. Gulley, that we couldn't rearrange
21 this. When you guys asked to rearrange it, I actually had a
22 trial scheduled for the 17th, 18th, and 19th, which precluded
23 me from moving this there, and so I just didn't want to -- I
24 didn't want to have to push it farther into June.

25 And then last week that case settled. So I'm sorry.

1 But since we already had this, and since you had said
2 you were okay to appear by phone -- I don't know what you're
3 doing, I hope I'm not interfering with your vacation, but
4 whatever, I thought for a variety of reasons we ought to go
5 forward with this as planned. So thanks for appearing by
6 phone.

7 It sounds like you're on a landline also. Are you?

8 MS. GULLEY: Yes, I found some temporary office. No
9 problem. Thanks for letting me attend this way.

10 THE COURT: Okay. Great.

11 Okay. I know we have a lot of things pending. My
12 intention today, frankly, is to go through and rule on as much
13 as I can.

14 At the end of doing that, it is possible that all we
15 will have under advisement is motions that require some in
16 camera review, which we'll have to talk about.

17 So I don't have a particular order here, but I think
18 I'm happy to deal first with this joint motion, ECF 699. It is
19 a joint motion by the -- CDK and the dealership class
20 plaintiffs to allow some late-served discovery, subpoenas to go
21 forward because both sides agree that they should be able to do
22 that. Authenticom, the vendor class, and Cox, as well as some
23 other folks who were included with that group, who I don't need
24 to always name, indicated some opposition to this. So I
25 issued -- I did issue an order that said, I think, you know, I

1 didn't see how this would delay the progress of the case.

2 But as I thought about it more, either Mr. Nemelka or
3 Mr. Ho, whoever is going to address this -- oh, I did start to
4 think, you know, when is enough enough? And I -- I thought I
5 could see some principle distinctions here.

6 But, anyway, don't you -- somebody tell me what your
7 opposition is here.

8 MR. NEMELKA: Thank you, your Honor. Mike Nemelka.
9 I'll be speaking on behalf of our clients.

10 It is pretty simple. It is actually that principle
11 that at some point discovery has to end. And these are late-
12 served subpoenas. And Infutor, in particular, has lodged what
13 we feel are meritorious objections on timeliness. And so we
14 don't take a position on the subpoenas that the dealers want to
15 serve to the telecom companies, which is why we, you know, can
16 join the motion. But our basis is pretty simple, that, you
17 know, at some point this needs to come to an end.

18 THE COURT: Why don't you oppose the AT&T -- the
19 telephone carrier subpoenas? Because nobody objects to them,
20 and it is just a -- it is just pushing paper back and forth.

21 MR. NEMELKA: Right. The telecom companies haven't
22 objected on timeliness yet, unlike Infutor. And also they just
23 -- these are routine subpoenas that the telecom companies
24 respond to in the thousands every year that it is -- they have
25 offices set up to do this. It is basic, simple records that

1 they have available, much different from a -- the type of
2 subpoena that was issued to Infutor.

3 THE COURT: Okay. Who is going to speak to this from
4 the prospective of the defendants?

5 And before you speak, I have to say that I have
6 changed my mind a little bit on this. I mean, I -- you know, I
7 know that Impact Group has produced. Infutor Data Solutions
8 has objected. I know that the subpoenas to the phone carriers
9 are more administrative, ministerial than the other ones. But
10 I have to tell you what my leaning is after thinking about this
11 so that you know what you are dealing with. I'm thinking about
12 denying the joint motion entirely, without the agreement of all
13 parties. I'm -- you know, if -- including the telephone
14 carrier subpoenas. Those haven't been served yet. There is a
15 motion late to file them. You guys served your subpoenas on
16 the last day of discovery. That's usually not the way it is
17 done.

18 And given what I see in this case and the continuing
19 attempts to expand scope in some ways, a large part of me
20 feels, you know what, you're -- you got to wind this up. I
21 keep hearing from Authenticom that, you know, there are -- it
22 is being delayed, we're pushing things out too long. And while
23 I don't know how this particularly will push things out too
24 long, no doubt based on what I see in front of me, at least
25 Infutor, I'm going to have to deal with objections from a third

1 party, so that will delay what you are doing. Potentially
2 somebody gets the document and says, ah-ha, they found
3 something that I didn't know before, and now I want to reopen
4 somebody's dep. I don't know that I should be countenancing
5 any of that.

6 So, you know, your subpoenas were served on April
7 30th. Discovery closed on that date. Without disagreement of
8 the dealership class plaintiff, you wouldn't be able to serve
9 those. And without your agreement, the dealership class
10 wouldn't be permitted to serve these additional subpoenas.

11 What happened there, did we drop her?

12 THE CLERK: Ms. Gulley?

13 MS. GULLEY: Yes. Good morning. Thank you.

14 THE COURT: Okay. Just -- you know what, I'm going to
15 give you Brenda's email right now because --

16 THE CLERK: She has it.

17 THE COURT: She has it?

18 Okay. Because we have been having problems for weeks,
19 months with our AT&T connection here. So if we drop you, you
20 need to let Brenda know, and we'll get you back on. Okay?

21 MS. GULLEY: I have got her email.

22 THE COURT: Okay.

23 Yeah, so that's my feeling. Mr. Ross, you can wade in
24 to that now. But -- I don't know, I'm just thinking, let's
25 move this thing forward so you can get to summary judgment,

1 trial, settlement, anything else, appeal.

2 Go ahead. I want to tell you what I was thinking just
3 so that you had -- you weren't -- you knew what I was thinking.

4 MR. PROVANCE: Thank you, your Honor. This is Matt
5 Provance.

6 THE COURT: Oh, you're doing it. Okay. Fine.

7 MR. PROVANCE: Yes. Thank you for sharing your views
8 on the matter. That's helpful and informs our thinking.

9 One point I would like to make is that we did serve a
10 subpoena to Infutor. It is towards the end of discovery. It
11 is based on information that in our view we learned very late
12 in the discovery process. And that was the main motivation for
13 the timing of our subpoena.

14 Our main interest here is simply that the discovery be
15 a two-way street, that it go both ways. At the last status
16 hearing, Mr. Nemelka, I believe, stated on the record that he
17 was very interested in the AT&T and carrier subpoenas going
18 forward, although he couldn't join them formally.

19 To the extent he is taking an opposite position now, I
20 think that that's somewhat inconsistent.

21 But the plaintiffs have identified some limited
22 discovery that they would like to take from the carriers. We
23 have identified, in our view, limited and targeted discovery
24 that we would like to take from a third-party, Infutor.

25 Now if your Honor is of the view that there needs to

1 be a cutoff and the cutoff has taken place and we need to move
2 forward, the defendants are prepared to accept that. We would
3 just ask that that rule be applied evenly to both sides, which
4 it appears that your Honor is inclined to do.

5 THE COURT: Well, I would apply it evenly to the both
6 sides in the context of joint motion ECF 699. This thread runs
7 through some of the other motions that are pending and that I
8 am going to have to deal with or will deal with today. And,
9 you know, sometimes it bites one way or sometimes the other --
10 it bites the other.

11 But my ruling on ECF 699, which is this joint motion,
12 is -- and I will be saying, Mr. Provance, that I'm not such an
13 ogre that if -- and, you know, I don't -- I only see things at
14 a particular level. I don't see things always at a granular
15 level, unless you bring me to the granular level.

16 So if all parties here, including Authenticom, Cox,
17 Auto Loop, and that whole group, end up saying to you, I
18 dropped my objection, I'm okay with you going through that one
19 because I really want to see these AT&T subpoenas because I do
20 agree -- I don't know if he changed his position or not. And,
21 you know, changes in position -- I know in this litigation
22 everybody accuses everybody else of changing their positions.
23 But I don't necessarily see a principal distinction that
24 Mr. Nemelka is relying on.

25 Yes, I understand the AT&T stuff is easier to produce

1 and deal with, because we're not going to get a motion to quash
2 from them, than the Infutor stuff is, so I get there is a
3 distinction there potentially. But I look at this more as a
4 tactical position. We don't object to the dealership class
5 plaintiffs because we don't really want to aggravate our
6 co-plaintiffs any more than we need to aggravate them. But we
7 do object to the defendants because we don't care about
8 aggravating the defendants.

9 But if everybody says, you know what, this stuff
10 is -- if Authenticom, Cox, et al., decide, you know what, I'm
11 willing to drop my principle here, quote unquote, and agree to
12 your subpoena going forward, defendants, so that we could get
13 the AT&T, Verizon, and Sprint stuff, because I think that's
14 really valuable too, I'm not going to block it. If both of you
15 decide to go forward, you're agreeing to do it, fine. I'm
16 hoping that doesn't spawn continued litigation. But if you
17 guys are agreeing to it, I'll go it.

18 But absent agreement of the parties on all fronts with
19 respect to the joint motion, I'm going to deny that motion.

20 MS. RICHTER: Your Honor, may I get some clarification
21 on that?

22 THE COURT: Yeah.

23 MR. RICHTER: Frank Richter.

24 THE COURT: Yes.

25 MS. RICHTER: So this agreement kind of came about

1 because we had briefing for the wireless subpoenas due. We had
2 arguments we believe good cause existed for extension of the
3 fact discovery. And defendants then responded that they had
4 good cause for their subpoenas as well. And that was the
5 result of the joint agreement.

6 You don't want to hear any argument as far as good
7 cause or briefing any further is the way we should understand
8 this order.

9 THE COURT: Okay. I have a visceral reaction to that,
10 but I want to cage my visceral reaction and consult here for a
11 second.

12 (Brief interruption.)

13 THE COURT: Here's my ruling. Okay? My visceral
14 ruling was, heck no. Okay? My visceral ruling was you are
15 stuck with this because you agreed to go forward with this
16 joint motion.

17 However, I realize that you tried to tie my hands by
18 saying that this was an all-or-nothing agreement, Judge, so you
19 got to accept our agreement or not. Okay?

20 You want to knock yourself out -- I mean, I will tell
21 you -- when did you seek leave --

22 MR. RICHTER: I'm not requesting further briefing --

23 THE COURT: Well, then why did you --

24 MR. RICHTER: -- your Honor.

25 THE COURT: -- are you raising the issue?

1 MR. RICHTER: I just want to make sure --

2 THE COURT: Just because you like to dot Is and cross
3 Ts?

4 MS. RICHTER: Your Honor, just so we have
5 clarification for the parties, they say, well, we still want --
6 you know, defendants say, well, we would still like to brief
7 it. We have an answer to that --

8 THE COURT: Okay. Here's my --

9 MR. RICHTER: -- and that way we don't have any
10 confusion that we're -- we're good to go, let's not -- let's
11 close the book on this, and we're done. That's all I'm a
12 asking.

13 THE COURT: Here's my response to your theoretical
14 question. I'm ruling on 699. It was a joint motion. Okay? I
15 recognize the joint motion said, this was an all-or-nothing
16 deal, Judge. We want to tie your hands on this. I'm denying
17 that motion, even though it was a joint motion because it is
18 opposed by the -- one class of plaintiffs.

19 If that now brings a motion for leave to serve these
20 subpoenas at a briefing schedule, you know, I'll decide that,
21 if, as, and when it is briefed. And hopefully that's this
22 year. But -- and I say that facetiously. Okay? But I'm not
23 going to rule on -- I'm not going elsewhere.

24 You need a briefing schedule on it? Then file your
25 motion for leave -- do you have -- no, you don't even have the

1 motion for leave. File it. Give me a briefing schedule. If
2 they want to brief the Infutor, knock your socks off. I'm just
3 ruling on the joint motion that is in front of me now, and I'm
4 doing it.

5 MR. RICHTER: Understood, your Honor. Thank you.

6 THE COURT: Understood?

7 MR. RICHTER: Yep.

8 THE COURT: Need any more clarification on that?

9 MS. RICHTER: Absolutely not.

10 THE COURT: Good. Okay.

11 Next issue, motion that has been pending for a bit of
12 time, plaintiffs's motion to compel production of documents on
13 CDK's privilege log. I think this is -- I don't even know what
14 the number of the motion -- I probably do. Hold on. I think
15 it is ECF 535.

16 Four issues here. Emails to a large number of
17 recipients; emails to distribution lists where the list does
18 not identify everyone who received the email; communications to
19 third-party advisors, consultants, and agents. I don't know
20 how many -- I might have said three issues. There is five
21 issues.

22 Advice that is predominantly not legal in nature; and
23 implicit waiver. Okay?

24 Here's my rulings on these. Subject -- Topics 1 and 2
25 overlap, right? Emails to a large number of recipients and

1 emails to distribution lists where the list does not identify
2 everyone who received the email.

3 As to both categories I agree with plaintiffs that CDK
4 has not met its burden of establishing privilege with respect
5 to all the recipients who received these emails.

6 With respect to the first category, the large number
7 of recipients, it seems that defendants can identify who
8 received the emails, but there is nothing in the briefing to
9 indicate why all those people are within the attorney-client
10 privilege.

11 With respect to the second group of emails, to the
12 distribution list, CDK can't even identify the recipients for
13 some of these lists. I disagree with CDK that plaintiffs are
14 going back on some type of agreement that they reached or
15 reneging on some type of agreement that they reached to accept
16 these distribution lists because plaintiffs say, and I don't
17 say anything in the record to contradict this, that at the time
18 they were talking about that agreement, they did not know and
19 didn't -- hadn't discussed with the defendants that CDK could
20 not identify even the people who were -- to whom the email was
21 directed as part of a distribution list.

22 It is CDK's burden to show privilege. It has not
23 shown privilege as to either group of email. Again, because
24 the first one, they haven't told me why all those people are
25 within the privilege. And, parenthetically, the more

1 people -- there is no -- CDK is right, there is no per se rule
2 that says, five people can be in a distribution list for a
3 privileged communication, but eight can't. Or 20 can, but 25
4 can't.

5 But I don't even have a threshold showing by CDK that
6 the people to whom the emails in the first group are directed
7 are covered by the privilege.

8 And in the second, if you can't even identify who the
9 email went to, then you're not going to be able to identify
10 privilege.

11 So I'll grant the motion with respect to both those
12 categories of emails.

13 With respect to the next two categories,
14 communications to third-party advisors, consultants, and
15 agents, and advice that is predominantly not legal in nature, I
16 need more information. These were briefed at a pretty high
17 level. All I have is the privilege log really. I don't have
18 the documents.

19 And so in order for -- and I think that's true.
20 Correct, CDK?

21 MR. PROVANCE: Yes, your Honor, that's correct. We
22 have not submitted those in camera.

23 THE COURT: So that's always a painful process. I'm
24 not going to spare you the pain of that process. If I have to
25 go through each of these documents document by document,

1 instead I would convene a hearing in which I would go through
2 each document and see whether or not in all or in part the
3 document really is or is not something that fits within the
4 privilege.

5 My guess is that that will be a painful process and
6 that all the documents will not fit within that category
7 because -- or all parts of a document won't fit within that
8 category because I just -- that's just my experience.

9 But the issue was addressed at a 10,000-foot level,
10 not on a -- you know, I agree with the plaintiffs that if
11 the -- I mean, I agree with both parties here. Third-party
12 advisors, such as are identified in these briefs, can be within
13 the privilege if a communication that includes them is
14 necessary for the lawyers to provide the advice.

15 If it is not, and he can't make that case, then they
16 are not within the privilege.

17 I also agree that communications that are not
18 predominantly legal in nature, or stated another way, if it is
19 not an attorney-client communication within the law, then it is
20 not going to be protected.

21 So if I have to decide this issue, I'm going to set a
22 hearing on it. And you guys are going to come in, and we'll
23 spend as much time as necessary going through document by
24 document. I do want CDK to submit to me in camera ASAP the
25 documents that are subject to this.

1 Does anybody have a -- I mean, I know I have read your
2 brief, but is this ten documents? 50? 150? 2000?

3 CDK, how many are we talking about here?

4 MR. PROVANCE: Your Honor, unfortunately I don't have
5 the list in front of me. But I think it is probably in the
6 range of hundreds. As you know, CDK produced a lot of
7 documents in this case, and as a result our privilege log
8 contains a lot of entries.

9 THE COURT: Okay. Is there any benefit for me -- I
10 mean, I'm not going to decide -- I can't decide this on the
11 papers because I don't know what the document say. I mean on a
12 broad basis, I agree that, you know, plaintiffs said, I don't
13 see how they are privileged, but all I have seen is a privilege
14 log.

15 From CDK's basis from what you say, I could say, yeah,
16 I could see how some of this stuff is privileged. Is it all?
17 I mean, before you submit this to me in camera, you want to go
18 through these documents and redact what is actually something
19 that is privileged versus are you available for squash on
20 Saturday afternoon?

21 I mean, you know, this -- did you produce in a
22 redacted way or did you just claim privilege on the entire
23 document?

24 MR. PROVANCE: Some of the documents at issue are
25 redacted. Some of the documents at issue were withheld

1 entirely.

2 THE COURT: Okay. So for the one -- so you -- I guess
3 what you are telling me is -- I am interpreting what you are
4 telling me as you have already gone through the exercise to be
5 more scalpel-like in your invocation of privilege and not
6 macro, and so I need to look at these things and set a hearing.
7 Right?

8 MR. PROVANCE: If I am interpreting your comments,
9 your Honor, I believe that's the way forward.

10 THE COURT: Okay.

11 MR. PROVANCE: If your Honor would like some sample of
12 the documents at issue --

13 THE COURT: Sample is not going to do it, right?
14 Because it is -- this determination has to be made on a
15 document-by-document basis. I don't see any way that -- I
16 mean, if this was a class certification motion in a TCPA case,
17 I could look at samples. But, it is not.

18 I don't know how I am going to make an up or down call
19 on a document-by-document basis without seeing the documents.

20 MR. PROVANCE: Understood.

21 THE COURT: So I'd like you to -- you don't have to
22 say right now, but at least by the conclusion of the hearing
23 tell me when you're going to submit those documents in camera.
24 We could talk about when I'm going to have a hearing on this.
25 Okay?

1 MR. PROVANCE: Your Honor, I had a few points of
2 clarification, but I'm happy to wait until you have finished
3 your ruling.

4 THE COURT: Okay. There is just one more thing. I
5 don't buy plaintiffs's implicit waiver argument. That is a
6 complete flyer of an argument. It does not work. I address
7 the issue of when a party puts advice of counsel in issue very
8 recently in a case called Derek versus Roche Diagnostics. It
9 is reported at 2109 Westlaw 1789883. Some of the reasoning and
10 language in that opinion is equally applicable here.

11 Plaintiffs's argument is just completely out to lunch.
12 I mean, the page 12 of the motion -- or the memorandum in
13 support of the motion says, quote, by relying on the text of
14 the agreements, these particular agreements you're looking at
15 -- you're talking about, which were drafted by counsel for
16 the -- for their defense, defendants have put the intent of
17 those agreements at issue.

18 That just makes no sense. I mean, that's a flyer
19 argument. You devote about a little over a page to it if you
20 look at all of it. There is no indication CDK is going to rely
21 on communications with counsel in support of its defense
22 relying, or at least in the briefs, with respect to this stuff.

23 I know you cite case law. And I know the case law
24 exists that part of the privilege and waiver issue is based on
25 fairness. I don't see any unfairness here.

1 And I don't think that by relying on the text of the
2 agreements that are drafted by counsel, which is the case in
3 every sophisticated business litigation, CDK has put the advice
4 of counsel defense at issue or its communications with counsel.

5 You guys while I was speaking, at the plaintiffs's
6 side, Ms. Wedgworth, Mr. Ho, and Mr. Nemelka, were whispering.
7 So what do you have to say on that? Am I misperceiving
8 something?

9 MS. WEDGWORTH: Your Honor, it is just in one of the
10 depositions there -- well, maybe more than one actually. There
11 has been testimony that may cause that actually to come -- be
12 an issue in this case. I appreciate your ruling. And given
13 what you said -- and I want to look at this case -- but we do
14 have factual testimony where witnesses think one thing went in
15 the agreement, and then it is understood that because of
16 attorneys something else went in the agreement.

17 So it may be a factual issue in this case. And I want
18 to review this particular case you have referenced in regard to
19 the testimony we have in this case.

20 THE COURT: But none of that was in the briefing that
21 I reviewed, right?

22 MS. WEDGWORTH: It had not happened at the time.

23 MR. NEMELKA: Correct.

24 THE COURT: Yeah, okay.

25 MS. WEDGWORTH: Into the briefing predated it. We

1 were -- we thought that might be the case when we briefed this.
2 We didn't have the testimony at the time. We now do.

3 THE COURT: Okay. So listening to what you said in
4 some way critically, I would say I still -- from what you told
5 me, it didn't get me over the hump. You know, there has to --
6 the fact that a corporate party spoke to a lawyer about what
7 was going to go in or not in the agreement. And this -- and
8 this case -- and I recognize that there is a lot of law in this
9 area, and some of it is not as clear as you would like it to
10 be. But I don't know that that gets you the documents unless
11 and until we hear that the party relying on the privilege is
12 going to somehow put in issue those discussions.

13 So it is not a -- it is not necessarily a sword that
14 says, well, because lawyers were involved in the drafting, and
15 on advice of counsel something did or did not go into the
16 agreement, therefore we get the entire agreement. It might be
17 that you need more than that.

18 But, again, based on what I have seen, at least as the
19 issue has been presented to me now, I'm going to deny the
20 motion with respect to that.

21 So I'm happy to hear from Mr. Provance. I'm granting
22 it on the first two categories on emails.

23 I'm holding it -- it remains under advisement with
24 respect to communications to third-party advisors, consultants
25 and agents, and advice that is predominantly not legal in

1 nature pending submission of the relevant documents in camera
2 and a hearing at which the Court can address those documents
3 with the parties. And it is denied as to the implicit waiver
4 argument.

5 Mr. Provance.

6 MR. PROVANCE: Thank you, your Honor.

7 If I understand your ruling on the fifth issue,
8 implicit waiver, it sounds like you have ruled, so I will just
9 move on. I was otherwise going to address some of the things
10 Ms. Wedgworth said, but I'm happy to just move on.

11 The next point I wanted to raise, I think you have
12 just clarified, which was whether your Honor wanted in camera
13 submission on both Categories 3, the third-party
14 communications; and Category 4, the communications that are
15 putatively business in nature.

16 I believe you have just clarified that, and we'll get
17 those to you --

18 THE COURT: Right.

19 MR. PROVANCE: -- in short order.

20 On the second issue, your Honor, I just wanted to make
21 one point and clarify, if needed. This is the issue regarding
22 distribution lists. And the one thing -- factual nature I
23 wanted to point out is that all that was at issue on that part
24 of plaintiffs's motion were certain distribution lists that at
25 the time documents were collected and reviewed no longer

1 existed. They're defunct. And that was the reason that
2 defendants were not able, at least with using the tools that
3 were normally available to them in the ordinary course of
4 business, able to determine who was on those now defunct
5 distribution lists.

6 And the plaintiffs had the same problem with some of
7 their distribution lists. So the agreement the parties made
8 was that for just those distribution lists that are now
9 defunct, they would not need to identify all of the recipients
10 that were on those lists. It is a much different story for
11 distribution lists that still exist, we can look at them and
12 provide that information. And, in fact, the defendants have.

13 So if your Honor is inclined to grant their motion and
14 require defendants to produce any communications involving now
15 defunct distribution lists, that issue is present on the other
16 side as well. So we would ask, in fairness, if that's the way
17 your Honor wants to rule, that you would order the plaintiffs
18 to do the same thing.

19 THE COURT: I'm not going to do that because I don't
20 have that in front of me. But that would be my same ruling.
21 If I have a situation in which an email is sent to a
22 distribution list and the -- and the custodian of that email
23 says it is privileged, and that party cannot identify to whom
24 the email went, my ruling is going to apply equally to
25 plaintiffs and to defendants.

1 So if you can't work this out with my ruling -- my
2 ruling necessarily would require plaintiffs to produce any
3 emails that they have claimed as privileged that fall within
4 this kind of a category, unless there is some distinction that
5 actually is meaningful, as opposed to just a distinction --
6 being a distinction without a difference, you know, as an -- so
7 I'm not going to rule on that now, Mr. Provance. But you can
8 get me in short order if they won't agree.

9 This strikes me as one of those mutually assured
10 destruction kind of issues which, you know, what's good for the
11 goose is good for the gander on the plaintiffs's side. And if
12 you are sitting on protecting things that are in the same
13 category that you're talking the other side should produce, and
14 I buy your agreement, which I do, then you have got to be
15 prepared to produce yourself too. And you say they didn't ask
16 for them yet. Okay. Now they are going to ask for them.

17 And so you can either go one of two directions. You
18 can say, we want all your emails protected under this category,
19 and we'll produce to you all of ours. Or you could say, never
20 mind. Now that the Judge says -- has one my argument that I
21 spent some pages on, I really don't like the impact of my
22 argument on what I'm going to have to produce, and I'm in a
23 never mind zone.

24 To me, if you do that, that was a waste of time. It
25 was a waste of my time, and it was a waste of your time. But

1 I'll deal with whatever I deal with in the next go-around here.
2 But I will tell you that I will attempt to rule the same when
3 the same facts are in front of me provided there are no
4 differences that I think are material to a ruling.

5 So we still need -- and I'll just kind of flag here
6 that somebody should remind me -- a date for submission. And I
7 would have to set a hearing date, which I'm not sure I'm
8 completely prepared to do now.

9 But that's where we are on the motion to compel
10 documents off the privilege log.

11 I think that brings me to the issue that everybody
12 briefed, that motion to compel versus Authenticom.

13 No, I can quickly go to CDK's motion for a protective
14 order concerning plaintiffs's interrogatories on the
15 counterclaims, which is ECF 597. I'm going to deny that motion
16 for a protective order and allow plaintiffs's interrogatories
17 on the counterclaims to go forward.

18 I agree with plaintiffs that given the way the case
19 schedule was put together in this case, and given the pendency
20 of the motion to dismiss the counterclaims during the period of
21 time where discovery was proceeding, that plaintiffs would be
22 prejudiced unfairly if after their motion to dismiss the
23 counterclaims was denied, they are denied the opportunity to
24 proceed with written discovery on the counterclaims.

25 Those interrogatories, as far as I can tell, were

1 served within the discovery time period. And had they been
2 responded to would have -- they were served in time for them to
3 be responded to within the existing discovery time period,
4 which as per Judge St. Eve's statement, I think, was not
5 technically including the counterclaim discovery.

6 I disagree, in case this is the next question, that
7 CDK can now serve discovery after the close of discovery on the
8 counterclaims that it didn't serve before. CDK made a
9 calculated decision to oppose the discovery that the plaintiffs
10 serve the written discovery without serving their own as a,
11 what's good for the goose, good for the gander kind of move.
12 But, again, consistent with my attempting to get this done, I'm
13 going to deny CDK's motion.

14 Plaintiffs can serve the interrogatories that they
15 served -- CD -- I am going -- if CDK asks me, now let me do
16 that, I'm going to say, no, because it wasn't served in time
17 during the discovery process, even in a protective way.

18 And one thing I needed to look at here was whether
19 there was any -- were there any particular interrog- -- so, I
20 mean, I noticed in the briefing here, and I'm not trying to
21 override this, for example, that counterdefendants offered to
22 completely withdraw Interrogatories Numbers 17 and 18 and
23 offered to accept summary responses to the interrogatories
24 which called for CDK to identify numerous instances of certain
25 events or conduct.

1 I mean, I'm not trying to override that. You know, if
2 plaintiffs are still willing to say, we will withdraw these and
3 accept something else, I'm not saying now my ruling supersedes
4 that.

5 But what I am -- I'm just ruling on the timeliness
6 issue here, primarily, and whether plaintiffs could go forward
7 with this. I do note, in reading other motions that you have
8 pending, that there -- discovery has been going forward on the
9 counterclaims. I mean, CDK has been taking copious -- probably
10 the wrong word -- extensive discovery maybe on Authenticom
11 about its access to defendants's -- and so has Reynolds -- the
12 defendants's systems. So, you know, oral discovery has been
13 going forward on this. But, you know -- and this motion has
14 been pending since April, but it was probably fully briefed, I
15 don't know, in -- some time in May.

16 End of April. Yeah, the last day of April or the 29th
17 of April. So it hasn't been sitting there for too long.

18 But, anyway, whatever you want to do to make it easier
19 on CDK, I'm not saying don't do. And whatever you referenced
20 in your briefs, I'm saying not do.

21 But in terms of the up or down as to whether or not
22 you can -- you are allowed within the interstices of discovery
23 scheduling to serve these when you served them, I'm siding with
24 plaintiffs on that versus CDK, and denying the protective
25 order.

1 Clarification on that?

2 MS. MILLER: Your Honor, Britt Miller on behalf of
3 CDK. Two quick questions. One, obviously we did not prepare
4 responses pending the resolution of this motion. So we'd ask
5 for 21 days to respond to the interrogatories in question.

6 And, two, I assume from the tenor of your ruling that
7 the ones that have been served are it. There is no additional
8 ones that are coming. There is no follow-up, additional
9 interrogatories after they get whatever responses. Certainly
10 we'll engage whatever meet and confer process may be necessary
11 as to the responses that we serve. And if there is motion
12 practice on that, we'll certainly engage in it. But to the
13 extent that these are permitted to go forward, these are it.

14 THE COURT: Yes. These are it. And 21 days is fine.

15 MS. MILLER: Thank you.

16 THE COURT: If, with the qualification that you said,
17 that if you object to something and then you meet and confer
18 and then I have to deal with it, in the never-ending discovery
19 dispute process here, I'll do it. But I'm not saying they can
20 serve more or you could serve, I guess, any.

21 MS. MILLER: Understood, your Honor.

22 THE COURT: Okay. That brings me to the issues that
23 you briefed on an expedited basis. I will say, Mr. MacDonald,
24 I very much appreciate the email exchange that you had with
25 Mr. Nemelka in which you remind -- when Mr. Nemelka expressed a

1 desire to get this briefed in time for our June 10th. You sent
2 an email saying, you know, Judge Gilbert has said he would like
3 to have at least a week to look at things. And I didn't know
4 about that because the email that came to my courtroom deputy
5 had a proposed briefing schedule of June 5 and June 7, which
6 was plaintiffs's proposed briefing on this.

7 But I do appreciate at least your consideration of
8 saying, you know, maybe he should have a week to look at this
9 stuff, which he's asked for, in the give and take before filing
10 of the -- this motion. That kind of went by the wayside in
11 some way. But I do appreciate it.

12 And luckily for Mr. Nemelka, I didn't actually go into
13 the ECF system -- I forgot the briefs here, so I had to print
14 them at all home. And I didn't see that you actually didn't
15 even file on June 7th, you actually filed on Saturday, June
16 8th. But that was okay because I was able to read it
17 yesterday. Okay?

18 I want to tell everybody here though -- and you can
19 tell that I have a little bit of an edge here, and I'm sorry
20 about it. Okay? I don't like the fact that I have so
21 many -- I have had so many motions under advisement, which is
22 why I'm trying to rule on as much as I can from the bench.

23 I do have an impression here that there are fights
24 here that don't need to be had. I have had that impression
25 from the very beginning. And I have had the -- I also have the

1 impression, you know, that sometimes positions are taken for
2 tactical reasons without fully thinking through the impact of
3 those positions on your own positions. As an example, I'll
4 talk about these email distribution lists, which I talked about
5 before.

6 So, you know, those types of things, just in my mind,
7 increase the stress and tension in your litigation, increase
8 the stress and tension on the Court, but that shouldn't really
9 be your concern.

10 But I do generally like to have more than a weekend to
11 think about something. The reason that I said I adopted your
12 briefing schedule and also went forward here is I do agree
13 you're entitled to rulings as soon as you can get them, as soon
14 as humanly possible.

15 Had I known my trial from next week was going to
16 settle, I would have moved you there, so I would have had more
17 time to look at this. But I didn't know that. So -- but,
18 anyway, I noticed that. Okay. I noticed that.

19 With respect to the motion pending, I'm going to deny
20 the motion as to the reopening of the 30(b)(6) deposition as of
21 Data Vast. My view of the arguments being made -- and I read
22 the exhibits too, and I read the deposition testimony submitted
23 -- is that defendants's argument is weak and an overreach that
24 Data Vast was a topic that was noticed for 30(b)(6) deposition.

25 This isn't an after-the-fact objection. The objection

1 was raised by counsel at the deposition. The deponent said he
2 wasn't prepared on that. He was general counsel. And so, you
3 know, he would have only been able to -- been required to
4 testify with respect to what he was prepared on.

5 I don't buy the defendants's argument in particular
6 that -- I have to find it. Hold on for a second.

7 (Brief interruption.)

8 THE COURT: Yeah. Defendants kind of shoehorn in to.
9 They say, well, our 30(b)(6) notice defined Authenticom to
10 include any related companies, divisions or subsidiaries, which
11 could include Data Vast. Okay. I get that. That's not
12 necessarily wrong or accelerated. And it included any efforts
13 by Authenticom to secure or protect dealer data or any use of
14 or agreements with third-party vendors to obtain data
15 maintained on a CDK or Reynolds DMS.

16 I don't think we're talking about securing or
17 protecting data really. And if that really was what you were
18 talking about, that's a vague way of saying it for a 30(b)(6)
19 topic. We're not really talking about obtaining data as much
20 as distributing data from the -- that Authenticom got.

21 So I don't think you could shoehorn Data Vast into the
22 served topics. And if this is the best that defendants can do
23 it on it, I think it falls short. I don't think it is worth
24 reconvening a 30(b)(6) deposition to cover this topic with
25 Authenticom's general counsel, particularly when that topic, I

1 think, is being covered in other depositions.

2 I get why defendants want this information, and I get
3 why it is important to their defense and their counterclaims.
4 Talking about Authenticom accessing their systems. But I think
5 you're getting information on that. And I think, you know,
6 again, in the overall theme of, we got to end this at some
7 point, I think this falls on the end of, we should end it.

8 If that was on day one of discovery, maybe I would
9 look at this differently. But it is not. And so I am going to
10 deny the motion as to reconvening the deposition as to
11 Data Vast.

12 With respect to the polling client manager data, I
13 have -- I have some questions for Authenticom here. I think
14 your argument -- well, first of all, let me dispense with a
15 couple of things and focus then on what needs to be focused on.

16 Timeliness. Overrule that objection. This issue has
17 been on the table for some time. You have been chasing each
18 other on this for a while. I read all the correspondence on
19 this. I read the -- you know, what you were talking about.
20 And I don't think this was put to bed. And I think,
21 particularly with the most recent statement, which is that we
22 can't even do this, it is impossible to do it, I just don't
23 think this was tied down.

24 Is this late in the process? Yes. But you have been
25 chasing each other around on this for a long time. And some of

1 the delay, at least from what I can see, is Authenticom's
2 fault, not CDK's fault.

3 Would it have been best for CDK to not -- to tie this
4 down, you know, back in October or November? Yes.

5 Did you do everything you could to help them tie it
6 down? No.

7 So the timeliness document is not working for me.

8 The spoliation issue, not ripe right now. I'm not
9 dealing with that. And that really doesn't come into play with
10 respect to whether you should or shouldn't produce something.

11 But I'm having trouble figuring out exactly what
12 exists. If something exists, my feeling is you have got to
13 produce it. But I'm having -- you know, Authenticom really
14 argued the strawman here, which is we can't produce a report,
15 and we can't produce -- we shouldn't be required to create a
16 document that doesn't exist. I agree with that. It is not
17 clear to me that that's what the defendants are asking for
18 here. It would be -- it sounds to me what the defendants are
19 asking for is a snapshot of what appears essentially on a
20 computer screen when somebody queries the database.

21 So they are not asking to prepare a report per se,
22 they are asking for information that is resident within your
23 system. So it -- you possess it. It is in your possession,
24 custody or control. It is information in your system that is
25 either a seven-day period or it is whatever you had in November

1 of 2018. I think the -- it is not clear to me from
2 Authenticom's response here whether anything exists. Okay?
3 Whether there -- but I have seen what you have produced to them
4 as an example, which I think is exhibit -- I mean, it is quoted
5 in full in the defendant -- the 18 lines are quoted in full in
6 defendants's brief, but -- it's -- is it 16 or --

7 MR. HO: It is an attachment to Exhibit 11.

8 THE COURT: Right. Yeah, it is the last -- yeah. I
9 mean, I see that but I am having trouble figuring out what
10 exists and what is ephemeral or what's tangible.

11 And so I'm going to ask Authenticom at least to
12 explain to me whether -- in particular whether what the
13 defendants are asking for, which is the PCM log for the
14 originally requested seven-day period in November 2018 or a log
15 for the seven days between June 10th and June 16th, which I
16 know is not necessarily within -- you know, before the lawsuit
17 was filed. But I think what they are trying to do is see how
18 does Authenticom's system interact with theirs or what kind of
19 data do you get. I'm not 100 percent sure that I understand to
20 what use they end up putting that. But I could see it being a
21 really nice visual in front of a jury, so I can understand why
22 they might want to see it.

23 But I'm just -- I'm trying to figure out what exists.
24 And I will tell you that if I don't understand what you are
25 saying, Mr. Nemelka or Mr. Ho, then I'm going to appoint a

1 special master to figure out what the heck you should produce,
2 if anything. And you guys are going to split the costs of
3 paying for it because if it is too complicated for me to
4 understand, I'm not going to have days of it.

5 I might need to have a hearing. I might need to have
6 an evidentiary hearing. I might need to put your computer guy
7 on the stand. But I'm going to bring in a special master who I
8 have appointed in other cases, Nora Grossman, who is an expert
9 on e-discovery. And, frankly, when I have appointed her in the
10 past -- I have actually never had to have an evidentiary
11 hearing because she sits down with the parties, speaks the
12 lawyer language because she's a lawyer, and also speaks
13 technical language because she is a technician. And she
14 figures out how the parties can resolve the issue, and I don't
15 ever have to deal with it. But if I have to deal with it, I
16 will.

17 But can you answer my question?

18 Or Mr. Ho.

19 MR. HO: I'm going to try, your Honor. I think there
20 is two aspects to the question of what's available. Temporally
21 my understanding is that what is available is information that
22 goes back seven days. So seven days from today is information
23 that is essentially overwritten. It rolls off after seven
24 days. But it is -- the second aspect of the answer is,
25 importantly, it is not in the database. It is not as if you

1 can query -- type in a query or run a search over a set of data
2 and pull out from a database the information that's being
3 sought.

4 This information is essentially imbedded in the
5 software program itself. And that's why from a legal
6 standpoint more than -- so than a technical one, we think that
7 the rule that governs this is Rule 26(b)(2)(B), and that this
8 clearly falls within the ambit of data that's not reasonably
9 accessible without undue burden or cost. Because some computer
10 programmer actually has to go into the software program and
11 find for every dealer or -- and every day the data that they
12 want. And so seven days doesn't sound like a lot, but when
13 you're talking about hundreds and thousands of dealers, and you
14 have to do it dealer by dealer for every day, as you see they
15 have taken a snap -- the Exhibit 11 that was alluded to is one
16 dealer for one day. So you'd have to do that many, many
17 different times. And it is not something that can be done in
18 an automated way.

19 As Mr. Clements's deposition -- declaration
20 highlights, and this is Exhibit 1 to our opposition, this all
21 has to be done manually by someone who actually -- a computer
22 software person who will actually have to log in to the
23 program. And we don't think that there is good cause to do
24 that.

25 As we highlighted in our opposition brief, we think

1 that this is exactly the kind of data that the Seventh Circuit
2 discovery program and the Sedona Conference and, you know, all
3 the kind of leading authorities about ESI say are presumptively
4 off limits because of the cost and burden involved. And we
5 don't think that the defendants have made the kind of showing
6 that you would need to overcome that.

7 In particular, with respect to relevance, as your
8 Honor has already identified, it -- at best it seems like what
9 the defendants are after is a sense of the kind of information
10 that Authenticom keeps in this, again, very ephemeral way about
11 the way in which its system accesses the DMS.

12 There is not going to be data that covers the relevant
13 time period in this case. It is only seven days long. So at
14 best it is going to be a demonstrative or illustrative set of
15 data. And, frankly, given the limitations on relevance, we
16 don't see how there could be good cause to over -- to justify
17 the imposition of this kind of a burden.

18 We have, as we pointed out, offered to do somewhat
19 more than the one day for one dealer that we have offered. And
20 to the extent that a slightly broader sample or illustrative
21 set could be useful, we have offered to do that.

22 But seven days for all dealers would be a monumental
23 task for a company that has been, frankly, financially
24 decimated by the defendants. We won't go into that again. But
25 Authenticom is a small company, much smaller now than it was

1 before, and simply doesn't have the resources to do this kind
2 of highly time-intensive project.

3 THE COURT: Okay. Couple of questions before I ask
4 the defendants anything. I saw the statement in Mr. Clements's
5 affidavit that Authenticom had to lay off two-thirds of their
6 work force during litigation. So I -- you know, I'm not
7 without appreciation of that.

8 A couple of questions. So what you're saying is that
9 the 18 lines in Exhibit 11, that was obtained by a computer
10 programmer going into one particular -- within a seven-day
11 period one particular dealer's information on the software,
12 taken a screenshot of that. But that would have to be -- if we
13 took a seven-day period, then somebody would have to go through
14 all of the software that ran during that period of time for all
15 of Authenticom's customers and take those same essentially
16 screenshots to comply with the defendants's request, right?

17 MR. HO: I will say I'm not a technical person, so I'm
18 not sure screenshot is exactly the right terminology.

19 THE COURT: Okay. Or a printout.

20 MR. HO: But conceptually that's exactly right.

21 THE COURT: Okay. And how many, roughly, do you know?
22 You said hundreds or thousands. There a difference between
23 hundreds or thousands. We're talking about many dealers?

24 MR. HO: Over time I would --

25 MR. NEMELKA: I don't know exactly today. Authenticom

1 used to service over 10,000 CDK and Reynolds dealers. It has
2 been drastically reduced. I think it is probably low
3 thousands.

4 THE COURT: Okay. And I take it by your response to
5 my question, CDK questions whether something exists in tangible
6 form that had been preserved from November of 2018. Is that no
7 longer -- is that not the case?

8 MR. HO: Your Honor, there were never reports
9 or -- these ephemeral data were never preserved or reduced to a
10 documentary form in the way that we would think of it under
11 Rule 34. With the exception of the one snapshot from December
12 of 2018 that we have then produced to the defendants in March
13 of 2019. So all we would be talking about, as far as I know,
14 is the seven-day period rolling back from today.

15 THE COURT: Okay. I know they are going to have
16 a -- they will have a field day on that particular point, but
17 I'll listen to them.

18 Okay. So we're talking about -- really just talking
19 about a seven-day period now as illustrative of what this would
20 look like. And what you are telling me -- and I think I
21 understand this without having a terribly substantial technical
22 background -- what you are telling me is because this data
23 resides in the software that Authenticom runs on a daily and
24 hourly and minute-by-minute basis, in order to provide even a
25 seven-day snapshot of this kind of polling data, CDK --

1 Authenticom would have to go into the software and physically
2 go in, query through that to find each transaction where you
3 could find something that looks like those 18 lines that you
4 produced in March of 2019, would have to replicate that for
5 every dealer who you had during that period of time, and what
6 software was being run. And that's a very burdensome
7 labor -- time intensive and costly process for a small company
8 that's lost a lot of its employees, at least in its technical
9 side.

10 The relevance of all that data for all the dealers is
11 minimal in your view. But you are offering to do something
12 that is much less burdensome. And I wasn't sure what -- that
13 changed overtime, it seemed to me, in the discussions you had.

14 So what are you now offering to do for certain -- you
15 mention 24 or something. I don't know what you're offering.

16 MR. HO: Ten CDK dealers and ten Reynolds data --
17 dealer rather.

18 MR. NEMELKA: Twenty.

19 MR. HO: So 20 total.

20 THE COURT: So you're offering to do what they're
21 asking for.

22 MR. HO: For one day.

23 THE COURT: Okay. And who is arguing this for your
24 side there?

25 Mr. MacDonald?

1 MR. MacDONALD: I am, your Honor.

2 THE COURT: Okay. So why is their offer not
3 sufficient?

4 MR. MacDONALD: Well, as your Honor referenced, the
5 polling client manager that contains information about what
6 files Authenticom polls, how long it polled for, when it
7 polled, how it polled. And Authenticom has told us they don't
8 otherwise track this information.

9 So polling client manager is really the only source of
10 instances -- of tracking instance Authenticom accesses
11 defendants's DMSs. Now obviously there are illustrative
12 reasons we want this that you mentioned. But also, as part of
13 our counterclaims, and defendants have counterclaims under the
14 Computer Fraud and Abuse Act, the Digital and Millennium
15 Copyright Act, and various other federal and state claims,
16 under those counterclaims, defendants need to be able to show
17 instances of wrongful Authenticom access. And Authenticom has
18 said they don't otherwise track this access.

19 And one of the problems we have is that, as you read
20 in the briefing, in the summer of 2018 Authenticom offered this
21 alternative log that they would produce to us to try to satisfy
22 us. And we took the deposition of Authenticom's 30(b)(6)
23 witness in April of this year. And it was the deposition
24 just -- this was a deposition just about data. And the first
25 topic in that notice was solely this issue of that alternative

1 log they produced. And their witness testified that that was
2 not -- this is a quote -- not an accurate representation of
3 polling, and that we couldn't rely on it for any of the
4 purposes to try to -- tended to show DMS access.

5 So the data they have on DMS access is stored in their
6 PCM log. They haven't retained it. They only have seven days.
7 And now they say they can't export it. And the alternative
8 data they gave us they say we can't rely on.

9 So if we don't get any better data -- and, again, this
10 is seven days, so it is going to be hard from that to do
11 extrapolation. It is not going to be great.

12 But if we don't get slightly better data, we are going
13 to come in here in a few months, and they are going to have
14 Daubert challenges against our expert saying, oh, you guys
15 relied on bad data. We told you it was bad data. But we don't
16 have anything else to rely on. So we're between a rock and a
17 hard place on this issue.

18 Now on the technical issues, we agree, we acknowledge,
19 we put to the side the spoliation issues. There are only seven
20 days of data. It is in a log. That's what their documents --
21 that's what their witnesses say. It is kept on their system.
22 The witnesses said, you can log in, you can look at this log,
23 whether you have to click on individual dealers or not, I'm not
24 sure. But somebody could log in and look at the last seven
25 days of polls right now.

1 Now we're willing to accept this in multiple forms if
2 it can be copy and pasted into a document, and we can do that.
3 Your Honor mentioned screenshots. We would accept it in the
4 form of screenshots that can be OCRd.

5 You know, if the manual difficulty of screenshots is
6 too high, and they want to set up a terminal for one of our
7 experts on the AEO basis to go in and manually create the log
8 themselves, we can do that. If it is easier to have a special
9 master do it, we can do that. Or we're open to alternative
10 solutions that would lessen the burden. But this is the only
11 place they store the data. That is what they have told us.
12 And this is data that we need.

13 THE COURT: Okay. I don't think I need a special
14 master here, thank God. And thankfully for you -- although her
15 rates are not outrageous. But I don't think I need a special
16 master here to understand this. I either underestimated myself
17 or overestimated the complexity of the issue that you have
18 here.

19 I -- from -- based on what I can read in the
20 documents, I think -- or in your briefs, I think -- and based
21 on what I saw in some of the deposition transcripts, the parts
22 that you did submit to me -- and I think you were -- were you
23 talking about Dane Brown's deposition?

24 MR. MacDONALD: No, this is Joe Noth's deposition.

25 THE COURT: Okay. Yeah, okay. That's -- you also

1 submitted that too, I think.

2 I think you are -- defendants are developing
3 information that potentially they could use to support their
4 theory of unauthorized access to your system. You describe
5 some of that information at pages 2 and 3 of your brief on this
6 issue, which is sealed. It is ECF 711.

7 Plaintiffs take you to task for saying, well, why are
8 they saying all this stuff? They're just trying to dirty us
9 up. True.

10 But it also to me illustrates the type of discovery
11 you're developing. And while I understand your issue of
12 Daubert, you know, I don't know how that ends up coming out at
13 trial if the other side didn't produce or said I couldn't
14 produce the information, but they did give you a sampling.
15 That's beyond my pay grade, at least at this point, to decide.
16 But I do think you're entitled to some information on this
17 topic.

18 I agree with the plaintiffs that the burden on a small
19 or shrinking company of going through the so-called ephemeral
20 data to find this for hundreds, if not more, customers or even,
21 frankly, many, many tens of customers is burdensome and not
22 proportional to the needs of the case. I think the proposal of
23 ten CDK dealers and ten Reynolds dealers for one day during
24 this period of time will provide the defendants with -- and I
25 don't care if it is a screenshot or however it is. I mean, I

1 am not going to micromanage that process.

2 But the information to show the polling data for those
3 CDK and Reynolds dealers, as best as I can, determine what
4 you're -- again, the relevance of this information is not that
5 it is the recipe for Coke, it is for you to illustrate that
6 this happens. And yet another way, in addition to what you
7 have already illustrated, and I'm -- I can't really, based on
8 the testimony that you're getting, I can't see how this is not
9 adequate for the purpose that you need it for. What I do know
10 is that requiring lots more is not proportional to the needs of
11 the case.

12 And, again, we're talking about one day in 2019, I
13 think. We're not talking about prior time. But probably the
14 information is still helpful to you.

15 But I -- so in substance, I think the information that
16 you're looking for has some relevance. The burden on CDK -- on
17 Authenticom of producing a complete seven-day set of
18 information -- of this information, I'm convinced, is unduly
19 burdensome and not proportional to the needs of the case from
20 what I understand the information will show and how it will be
21 used.

22 I do think that the proposal of ten CDK and ten
23 Reynolds dealers is much more proportional to the needs of the
24 case and will provide the defendants with some of the
25 information they're getting, at least on an exemplar basis.

1 And my understanding really of what the defendants
2 want is an exemplar basis because whether it is a full seven
3 days or it is a one day, you're looking -- you're not going to
4 get the entire history of the polling data, you're only going
5 to get a sample. So the only question really is how large the
6 sample should be. And, I mean, I don't know if ten is right or
7 12 is right or whatever. But I think that's within the realm.

8 Hold on for one second.

9 (Brief interruption.)

10 THE COURT: I'm thinking something. Hold on.

11 (Brief interruption.)

12 THE COURT: I take it, Mr. Ho, that the burden on
13 Authenticom really is in the process of querying the software
14 to get the information. So hypothetically if you did, you
15 know, ten exemplars for CDK dealers and Reynolds for day one,
16 and then for day three you did ten different dealers, they
17 would get 20 dealers for CDK and 20 for Reynolds on different
18 days, that would double your burden in the sense that you have
19 to look at two days.

20 Well, hold your answer to that for a second.

21 Mr. MacDonald.

22 MR. MacDONALD: Yes, your Honor, I --

23 THE COURT: Is your objection -- is your objection to
24 -- I mean, here's my problem with your argument. You're not
25 getting a statistically significant sample, in my view, under

1 any scenario for the entire time period that this occurred.
2 Whether they give you seven days, whether they give you a
3 rolling seven days or not, that's not a statistically
4 significant sample, I think. I mean, you know, I'm beyond my
5 pay grade on that too.

6 But what you are getting is an exemplar. And the only
7 question is how large that exemplar should be. So why is an
8 exemplar that shows ten CDK and ten Reynolds dealers on one
9 day, why is that materially less helpful to you, for example,
10 than seven days?

11 MR. MacDONALD: Well, your Honor, I'm not a
12 statistician either, but my understanding is the larger the
13 sample we can get, the -- you know, anything that we do here,
14 since Authenticom doesn't really track or keep this
15 information, is going to be an attempted extrapolation. There
16 is going to be some uncertainty there.

17 But a larger sample will give us slightly more comfort
18 in doing that sort of extrapolation to see kind of what they
19 are doing on a systemic basis, how often they are accessing our
20 systems, how often they are polling for certain types of files,
21 how often they are running certain types of scripts or running
22 circumvention on our security. So the larger the sample, the
23 better off -- the better data we would have.

24 And I also wanted to say, to the extent that we're
25 limited to 20 CDK dealers or, you know, ten CDK and ten

1 Reynolds dealers, however it is, defendants will request that
2 we get to pick the dealers that are used.

3 THE COURT: Okay. I know you're not a statistician,
4 but I don't buy your argument because what your argument really
5 sounds like is an exemplar argument. I mean, and you have got
6 testimony from Authenticom -- and I can't remember which
7 deposition it was in, but I read it. Maybe it is Noth -- that
8 Authenticom queried the system for hundreds of people -- of
9 dealers, I think. I mean, you have got that testimony, right?

10 MR. MacDONALD: But the issue, your Honor, is that
11 under some of the statutory claims that we have brought, the
12 Digital Millennium Copyright Act, each instance, each query is
13 its own statutory violation. So we need to be able to quantify
14 how many times they have queried our systems. Authenticom has
15 not produced very good data on that, so we're trying to
16 extrapolate it from a variety of sources. And this would be
17 one of our sources.

18 And, obviously, you know, a seven-day period in June
19 2019 is not the ideal data set, but it is better than nothing.
20 And it is better than just having kind of a limited set of
21 dealers.

22 THE COURT: Yeah, I mean, I think -- I'm not sure how
23 much better than -- this snapshot is proportional to the needs
24 of the case. Let me just look here for a second at what you
25 said in your briefs. Your brief.

1 (Brief interruption.)

2 THE COURT: Yeah, I mean, my guess from what -- you
3 know, I mean, I know plaintiffs say you gave me this
4 information to prejudice them. I don't know, not really. But
5 you're trying to give me a picture of why the polling data is
6 important because you have already established wholesale -- in
7 your view wholesale access to the CDK system. So one of your
8 bullet points on page 3 says, Authenticom had CDK dealers
9 install a program called Profile Manager and used a system
10 administrator-level account to automatically re-enable DMS
11 log-in credentials that Authenticom was using to extract data
12 from CDK's DMS within minutes after CDK's security measures
13 disabled them. And you cite the 30(b)(6) deposition of Brown,
14 right?

15 MR. MacDONALD: Yes.

16 THE COURT: And that's really what we're talking about
17 here, right?

18 MR. MacDONALD: Well, that's --

19 THE COURT: To some extent.

20 MR. MacDONALD: Well, seeing the actual scripts run is
21 to some extent also trying to quantify it.

22 THE COURT: Right. But you're never going to get all
23 the scripts that were run. Instead you are going to have
24 testimony that says this happened a lot, and here's an example
25 of what it looked like in June of 2019.

1 But you're never going to get, I don't think, today,
2 from data that disappears, what happened prior to that date.
3 So even if I were to give you seven days from today, yes, you
4 could argue that you could extrapolate that. Everything else
5 is arbitrary in terms -- and I still haven't -- I mean, given
6 that it -- what you're asking for, I think, is illustrative,
7 I'm not sure how a larger sample, other than it is just a
8 bigger illustrative set, gets you anywhere.

9 I mean, how are you going to use this -- you say you
10 are going to give this to your experts, but your expert is not
11 here. Or you tell me you're not a statistician. I think
12 Authenticom would have an interesting time with an expert who
13 says, based upon a seven-day sample in June 2019, this is how
14 often I think this happened for a four- or five-year period.

15 MR. ROSS: Your Honor, just to chime in briefly. This
16 is Brian Ross.

17 Before -- part of the problem is that we don't know
18 what the numbers are for these most recent seven days. But one
19 of the things that we would hope to do would be to establish a
20 bare minimum, a conservative estimate that our experts can
21 apply. If you see a similar number of instances over June -- a
22 certain week in June 2019, and you combine that with testimony
23 where Authenticom is saying, we have lost customers, and we are
24 accessing your systems much less often nowadays than we were
25 back in the 2015 to 2017 period, then we would hope to

1 establish a floor in terms of quantifying these improper
2 instances of access. So that would be one example.

3 Would that be ideal? Of course not, but it would be a
4 -- certainly better than what we have to work with now on core
5 elements of our claims.

6 THE COURT: Yeah. And you all say you want to
7 identify the dealers. So do you -- is part of your proposal --
8 I'm not going to give you a seven-day look at hundreds of
9 transactions. I'm just not. That's unduly burdensome, it
10 seems to me. And I don't think it is proportional to the needs
11 of the case, as I understand what this is going to be used for.
12 Even if it is a better sample for you for your expert. Because
13 although I don't have hard data from Authenticom on this, I
14 have the Clements's affidavit. And his affidavit at some level
15 convinces me that this is a labor intensive exercise for a
16 company that may not have the folks to do it. And it has got
17 to be expensive. And it has got to be real expensive.

18 Unless you want to pay for them to go through there
19 and reimburse them for the costs of doing this.

20 So I'm not going to give you seven days.

21 You hesitate. You'll pay for it.

22 MR. MacDONALD: Depending on the cost, we would
23 consider it, yes. Or, you know, as I said earlier, we're
24 willing to have an expert do it if they will give us a terminal
25 and --

1 THE COURT: I doubt that's happening.

2 Right, Mr. Nemelka -- Mr. Ho?

3 MR. HO: We would certainly object to that, your
4 Honor.

5 THE COURT: Yeah.

6 I mean, we're talking -- at a -- conservatively we're
7 talking about hundreds of dealers through this period of time.
8 Or at least a substantial number of more than ten.

9 I mean, another way to cut this is ten that you could
10 identify for the seven-day period. I mean, I'm not sure how
11 much incremental burden that imposes on Authenticom. Ten
12 dealers a day for seven days.

13 Or ten CDK, ten Reynolds for seven days.

14 MR. NEMELKA: We'll multiply the effort by seven.

15 MR. HO: And, your Honor, if I could just make one
16 observation about --

17 THE COURT: How long -- do you know -- yeah, you can
18 in a second.

19 MR. HO: Sure.

20 THE COURT: Do you know, just because the party that
21 is raising the burden usually has to quantify the burden, do
22 you know for Mr. Clements's -- let's me see. I'll look at
23 Clements's affidavit. Hold on.

24 (Brief interruption.)

25 THE COURT: Yeah, see, he talks about a -- he is

1 talking about the strawman here. Rewriting the software to be
2 able to get a -- yeah, I'm getting to the point where maybe
3 I -- well, if --

4 (Discussion off the record.)

5 THE COURT: Right. I mean, do you have any idea as
6 you sit here today how much time it would take for ten CDK
7 dealers and ten Reynolds dealers? I mean, because you're
8 making that proposal, you must have talked to somebody
9 technically to find out how -- and then you just multiply it by
10 seven. So how much time is that? Time and expense.

11 MR. NEMELKA: They didn't give me a specific time.
12 They told me it would take about a week to get it to me because
13 I wanted to know about timing if this -- if this is something
14 that was offered or accepted. So they said it would take them
15 about a week. I don't know how they divided up their -- they
16 only have about three or four people now in their development,
17 and so I don't know how they would divide up -- how that
18 divides up man hours.

19 MR. HO: But --

20 MS. MILLER: Your Honor, this is Britt Miller. And I
21 don't purport to have had a sneak peek at Authenticom software
22 so as to say how it operates. But drawing on my limited
23 computer science background, I would think that you could -- if
24 you had identified the same ten dealers and you write the
25 script to be able to query the system for those ten CDK dealers

1 and those ten Reynolds dealers, you could run that query as and
2 against seven of the days, and return the results. I.e., you
3 wouldn't have to rewrite the program or rewrite the poll or
4 rewrite the query because it is the same query, just changing
5 the date.

6 THE COURT: I would bet they are not talking about
7 writing a query, I would bet that they are talking about
8 manually going into the system and locating the stuff. Because
9 Clements talks about the burden on actually writing a program
10 to do this.

11 Am I right?

12 MR. HO: Yes, your Honor.

13 THE COURT: Yeah. I think what they are talking about
14 is putting somebody in front of a computer screen and looking
15 at this, you know, what the seven-day period and extracting
16 from the software database this information. And, again, this
17 is without prejudice to their argument that the, you know,
18 courts have said this, quote unquote, ephemeral data that
19 shouldn't have to be produced anyway. It is kind of like just
20 scrolling stuff.

21 Right, Mr. Ho?

22 MR. HO: Yes, your Honor. I think of it as sort of
23 footprints in the sand. I mean, they are only there for seven
24 days, and then they are washed away as in the ordinary
25 operation of the software program. And that's exactly the kind

1 of data that we ordinarily think of as too burdensome to have
2 to preserve, maintain, and then produce in discovery. And we
3 think that that ordinary principle ought to apply here.

4 If I could just make one observation about your
5 Honor's point that I think is well taken, that this can only be
6 for illustrative purposes. I mean, I'm not a statistician, but
7 a red flag, you know, is raised in my mind when I hear the
8 defendant saying, well, actually we'd like to pick the dealers
9 because a central principle of any kind of extrapolation is
10 that it be from a statistically random sample. So they are
11 skewing the sample by their very request to decide which
12 dealers to choose, which leads me to think this really isn't
13 about experts or about extrapolation, it is, as your Honor
14 suggested, about trying to find as many illustrations as
15 possible that they can use, however they intend to, in front of
16 the jury.

17 THE COURT: Yeah, I mean, I do think it is trial
18 presentation. At least that's my gut here. I don't think
19 you're -- you know, Mr. MacDonald's -- I mean, Mr. Ross's ears
20 perking up and saying, well, we'll pay for it. We'll pay for
21 it. We'll put an expert there. We'll find all this stuff. I
22 still kind of envision, which hopefully they are not going to
23 be in front of me, the Daubert arguments about whether -- what
24 information in June of 2019 has to do with something else.

25 But I suppose defendants would argue, since the

1 company is smaller and retrenched somewhat, it can only be
2 worse earlier on in the period.

3 MR. ROSS: And just to be clear, your Honor, one point
4 of clarification. Mr. Ho has mentioned this concept of who is
5 picking the dealers. Obviously the statistical significance of
6 this data is precisely why we wanted to get a production of a
7 full day or days, irrespective of anybody picking dealers. But
8 in a world where we are -- we understand the Court's comments.
9 And in a world where we are going to be limited to a limited
10 subset of dealers, that's why we would like at least the
11 flexibility to choose. And if -- if we decide to choose them
12 in a randomly generated way, we'll do that. But the --
13 ultimately that was why we thought we shouldn't be limited on
14 the number of dealers.

15 THE COURT: Well, and to say it differently, you don't
16 want them to pick them. You would rather -- if somebody is
17 going to pick, you would rather pick.

18 What -- do you know, Mr. Nemelka, what's the over and
19 under? What's the difference on whether I were to say, for
20 example, all the polling data for one day between June whatever
21 and whatever versus ten CDK dealers for one day? I guess
22 depending upon how many dealers you're running, it could be
23 hundreds as opposed to ten, right?

24 MR. NEMELKA: Yeah, it's -- that's just very
25 burdensome. It is the seven dealers -- excuse me -- the 20

1 dealers over seven days is much less burdensome than doing all
2 of one day, by an order of magnitude.

3 THE COURT: So might I assume if it takes one week for
4 ten and ten, it would take two weeks for 20 and 20, right? Or
5 it would take two weeks for ten and ten over two days, right?
6 Probably, right?

7 MR. NEMELKA: Probably, that's right.

8 MR. HO: And, your Honor, more than just the number of
9 hours, this is a company that is on a -- you know, trying to
10 run a business at the same time and has been reduced to the
11 absolute bear number of people -- minimum number of people that
12 is required to continue to operate its business. So to take
13 one of those people and say, you have got to spend a week or
14 two weeks trying to find data for these, even, 20 CDK and
15 Reynolds customers is still a very significant burden on
16 management.

17 MS. GULLEY: Your Honor?

18 THE COURT: Yes, Ms. Gulley.

19 MS. GULLEY: Thank you. Sorry. I wasn't sure whether
20 there was a window. I was waiting for a window. Can I make
21 some comment for -- momentarily?

22 THE COURT: Sure. Now we will have a one, two, three,
23 three lawyers arguing for Reynolds and Reynolds.

24 MS. GULLEY: I'm so sorry, your Honor.

25 THE COURT: That's okay. We have got two for CDK, so

1 we have got the whole family in here.

2 MS. GULLEY: Okay. Well, thank you. So I just want
3 to address a couple of issues that you raised. First of all, I
4 appreciate that you are not addressing the spoliation issue
5 today. Obviously there are bigger issues. There are prima
6 facie elements that the defendants say in having to prove their
7 counterclaims, you know, that where we sent them hold orders
8 long, long ago and have asked for the type of data for a long
9 time, which we're just learning the data that we got wasn't
10 good enough.

11 With respect to the burdens, we understand, you know,
12 that this employee situation with the reduced forces that
13 plaintiffs put in their recent motions has been something that
14 they have been putting in their motions since this case was in
15 front of the Seventh Circuit, and after which Mr. Cottrell made
16 his statement to the press that the company was well positioned
17 and battled. That came after those layoffs when he made that
18 statement. We have talked about this many times.

19 Nevertheless we appreciate the burdens of this.
20 Reynolds and CDK have also had significant burdens. In polling
21 the transactional data that the plaintiffs requested, Reynolds
22 has to essentially shut down its accounting system every night
23 for months to pull that and had to pay tens of thousands of
24 dollars to buy additional server space.

25 So as an order of magnitude, we're talking about two

1 weeks for them. We have worked on this for months and months
2 and months. Because it goes to elements of the plaintiffs's
3 case, we have had to do that. This goes to a core element of
4 the defendants's case.

5 I understand that now, given that the plaintiffs have
6 continued to delete that information on an ongoing basis since
7 the case began, we only have seven days, but seven days is
8 better than zero days.

9 THE COURT: Okay. I hear you.

10 (Brief interruption.)

11 THE COURT: You know, there is nothing in -- I'm
12 re-reading the defendants's brief on this, which is sealed as
13 ECF 711. And really the whole import of what defendants are
14 arguing there is the illustrative purpose of this data rather
15 than, you know, a huge -- I'm interpreting it as more of a -- I
16 don't know how this gets you -- there is no affidavit from an
17 expert that says, I need seven days of data, for example, for X
18 number of Y dealers.

19 What you say at page 7 is the PCM log, which is
20 ephemeral data, I'm convinced, even though it would only
21 contain data for a limited time period, may be the only means
22 through which defendants can understand Authenticom's polling
23 activities on a poll-by-poll dealer-by-dealer basis. So it is
24 an attempt to understand kind of what's going on. Maybe I'm
25 putting too much weight in that.

1 Okay. I want to take a really quick break here. We
2 have been going since 9:30. I know I have an 11:15 criminal
3 hearing, which everybody has not yet arrived for. My intention
4 is to end you there.

5 Was there anything else you wanted me to deal
6 with -- I understand -- I guess there is -- there are a couple
7 of things that I would like to deal with with you. I want to
8 make sure I know when the documents are going to be produced.
9 I want to know of the remaining things under advisement what
10 your priorities are.

11 MS. MILLER: All of that -- your Honor, this is Britt
12 Miller. I'll let Mr. Provance speak as to when we can get the
13 documents to you.

14 As to other matters that remain under advisement,
15 Docket 539 and docket 543, which are defendants's motions to
16 compel production, they were both listed on the May 15th status
17 hearing report --

18 THE COURT: Uh-huh.

19 MS. MILLER: -- which actually implicate a number of
20 issues that your Honor ruled on with respect to CDK today.

21 THE COURT: Well, isn't 539 your motion to compel
22 Authenticom, which gets taken care of by what I am doing here
23 or is this more in --

24 MS. MILLER: No, this is a -- this is the motion to
25 compel Authenticom to produce communications off of their log.

1 THE COURT: Okay.

2 MS. MILLER: So these are specifically as to the
3 documents that they have claimed privilege to.

4 THE COURT: Okay.

5 MS. MILLER: Same thing is true of 543 --

6 THE COURT: Got it.

7 MS. MILLER: -- which is as to Auto Loop and Cox
8 Automotive. Again, we have asked for both of them either to
9 produce them or to put them for in camera review.

10 So to the extent your Honor is going to plan a
11 hearing, you might want to do it all at once.

12 THE COURT: I don't think I am going to -- I don't
13 want that kind of punishment.

14 MS. MILLER: Fair enough. Fair enough.

15 So those are the other -- so in terms of primacy, I
16 would -- considering the crossover, I would suspect that those
17 two would be ones we would be looking for for rulings in the
18 relative short-term.

19 THE COURT: Okay. And for those you would say I would
20 want the opposing party to send me the document -- I don't have
21 those documents in camera either, right?

22 MR. NEMELKA: Correct.

23 MS. MILLER: Correct.

24 (Discussion off the record.)

25 THE COURT: Something we received as zip file

1 documents on. Do you know which one that was?

2 MS. MILLER: That may have been the last round of in
3 cameras with respect to the class plaintiffs's motions that you
4 have already ruled on.

5 THE COURT: Okay.

6 MS. MILLER: So I don't believe we have submitted --
7 either side has submitted the actual documents with respect to
8 these three motions.

9 MR. PROVANCE: Your Honor, it is hard for us to know
10 for certain, but those may have been submitted in connection
11 with Docket 633, which is a separate motion to compel.

12 THE COURT: Yeah, the clawback documents and FTC
13 privilege, right?

14 MS. MILLER: Correct.

15 THE COURT: And then in addition to those, I have got
16 -- I had this issue about briefs for refreshing data. Has that
17 been taken care of? You don't have to do that?

18 MS. MILLER: There are a number of things that are
19 outstanding from the May 15th status. We have produced -- a
20 number of people have produced their refresh data. A number of
21 portions of that refresh are still outstanding as to certain
22 parties. There are agreed dates by which folks expect to
23 produce that data. But there may be issues following those
24 refreshes which may need to be produced or may need to be
25 addressed with your Honor.

1 There are also a handful of other items from the May
2 15th agenda, not motions, but issues that were raised that the
3 parties are still working through. But if those are not
4 resolved, obviously, we will have to bring those to your Honor
5 as well.

6 THE COURT: Okay. Mr. Provance, what's your thought
7 on when you can get me the documents in camera?

8 MR. PROVANCE: Your Honor, the short answer is that I
9 I will need to talk to my staff as well as probably our
10 discovery vendor. But in general we'll move with all alacrity.

11 One --

12 THE COURT: All deliberate speed.

13 Why don't you, plaintiffs, also talk to Mr. Provance
14 about when you can get me something with respect to what I
15 would need to look at with the -- off of log issues that you
16 have raised.

17 MR. NEMELKA: On the corollary issue?

18 THE COURT: Yeah.

19 MR. NEMELKA: Yes.

20 MR. PROVANCE: Okay. Your Honor, if I have could
21 just --

22 THE COURT: And send an email to Brenda as to when you
23 can do it. I'll enter an order.

24 MR. PROVANCE: If I could ask one question. One thing
25 that we have learned in the process with your Honor is that

1 submitting documents in camera that were produced with
2 redactions are often difficult for the Court to understand. We
3 could undertake an effort to identify documents that were
4 redacted, but then, you know, try some way to identify what we
5 have redacted, but make it so that you could still see it. We
6 can explore those things. But obviously it will take a little
7 bit longer to put those together.

8 THE COURT: Yeah. I mean, obviously, I'm going to
9 want to know what was redacted. I don't know if it is a
10 problem just with me or with other judges. But I am going to
11 want to know what's redacted in order to understand it. It may
12 be highlighting it or something, I don't know. But I -- that's
13 part of the process.

14 MR. PROVANCE: That's certainly an understandable
15 request, and we'll build that in to our estimate of how quickly
16 we can get you the documents.

17 MS. WEDGWORTH: Your Honor, if I may bring up, I think
18 ECF 294 and 308, going way back to July, August of 2018, we had
19 a motion where you ruled on the waiver part, but you didn't
20 rule on the underlying privilege part of those clawback
21 documents with the CDK production there, which got rolled into
22 the current clawback motions.

23 So when you do rule on the clawback motions, with
24 regard to CDK 294 and 308, which I think consist of roughly
25 1400 documents, still need the review for privilege.

1 And that I think rolls into the Docket 633, which
2 we -- which we have been discussing.

3 MR. PROVANCE: Your Honor, this is Matt Provance. I'm
4 not sure I agree with what Ms. Wedgworth just explained. There
5 were a set of clawback motions filed last year. Your Honor did
6 rule on the waiver portion.

7 As to substantive questions about whether those
8 documents were in fact privileged on a document-by-document
9 basis, your Honor instructed the parties to incorporate that
10 into broader challenges, because those clawback documents were
11 logged and part of defendants's privilege logs. And if there
12 are challenges to those documents based on their privilege log
13 entries, they could have, should have, and I believe were
14 raised in connection with the parties's discussions about
15 privilege logs that took place in November of last year.

16 And so from the Court's perspective we believe the
17 motions that were teed up, the documents that were challenged,
18 the privilege log entries that were challenged, they
19 incorporate all of that.

20 THE COURT: I think I agree with that. I mean, as I
21 recall this was a kitchen sink 1400 documents. I didn't have a
22 document-by-document challenge. And I think I said something
23 after I dealt with the waiver issue that if the parties really
24 want to do this on document-by-document basis, you have got to
25 tee it up to me on a document-by-document basis. And my

1 thought was that that's what was done with ECF 633.

2 I don't think -- if I am correct, and the 1400
3 documents from before was a kitchen sink basis -- and I'll go
4 back and look at that, but I am not interested -- I don't think
5 it was a -- I don't think I -- I think what I said at the time
6 was I can't rule on this on a kitchen sink basis.

7 Isn't that right, Ms. Wedgworth?

8 MS. WEDGWORTH: I thought this was the one where you
9 requested and received a sampling of those documents.

10 THE COURT: Yeah.

11 MS. WEDGWORTH: And when you looked at those, there
12 was this issue about the redactions weren't in the documents,
13 which delayed everything. So I thought we were still dealing
14 with the issue of how the redactions work with the sampling you
15 got.

16 To the extent they are rolled up into 633, we
17 certainly want everything ruled on at one point. I don't think
18 we have set aside the 1400, but they are included in the 633.
19 And, nonetheless, the 294 and 308 on the docket are still open
20 for that -- for the privilege.

21 THE COURT: How am I supposed to rule on the issues of
22 privilege on a sample basis, without knowing whether the sample
23 you gave me actually is really an exemplar for each and every
24 other document, and without some writing on there? I mean, how
25 -- I mean, I remember you gave me some samples or I asked for

1 some exemplars. I think I asked for a hundred or something
2 like that. And I had them in a box. And when I went through
3 them, it didn't help me at all, so --

4 MS. WEDGWORTH: I appreciate that question and
5 appreciate the answer is normally document by document. In my
6 experience in other cases, and I thought maybe this is where
7 you were going when you requested the sample, many times
8 magistrates or judges rules -- rule on those sampling, saying
9 here is a scenario where this is in or out. And then the
10 attorneys take that ruling and apply it to the rest of the
11 documents.

12 In this scenario, the Judge has already ruled that
13 this is coming in for whatever reason or this is -- this
14 remains on the privilege log. And we will follow that example
15 in going through. And that has worked in the past, and I -- I
16 didn't try to read into too much what you were doing with the
17 sampling.

18 But with the ruling from that sampling, we certainly
19 could adjust and figure out the rest of the production with the
20 understanding there are usually some documents that do not
21 cleanly fall into one of your previous rulings.

22 But, again, the issue that happened in one of the
23 hearings was when defense counsel produced that sampling, the
24 redactions didn't appear, it threw off the review of it, and we
25 left it at that.

1 MR. PROVANCE: Your Honor, I won't belabor the point
2 because we have a full record on this. We had prior hearings.
3 We can all go back and check what was said.

4 There have now been four motions to either clawback or
5 seek production of privileged documents against CDK.

6 Ms. Wedgworth on behalf of the dealers filed motions seeking
7 all certain categories of privileged documents that were
8 initially produced to the FTC original, but then clawed back.

9 But all those documents have now been logged. And
10 they were logged before plaintiffs filed not only Docket 633,
11 but also their general omnibus motion challenging clawback
12 entries at Docket Number 535.

13 So in terms of specific documents, there has been a
14 full opportunity to challenge entries, challenge individual
15 documents. And indeed the dealership class members and now the
16 individual plaintiffs as well have made many, many challenges.
17 And we have responded to them, and those issues are now fully
18 briefed.

19 MS. WEDGWORTH: My -- a brief response, your Honor. I
20 appreciate we're dragging this out. I'm not clear in that
21 response that that 1400 -- those 1400 documents have been
22 logged.

23 Mr. Provance, are you representing they have been?

24 MR. PROVANCE: So, first of all, I believe it is 2400
25 documents that were initially challenged by clawbacking. And,

1 yes, all those documents were either logged in connection with
2 the initial clawback motion that the plaintiffs filed last
3 summer in 2018 or were produced or have been included on the
4 privilege logs that CDK has now provided across its entire
5 productions.

6 THE COURT: Okay. We're going to probably have to
7 leave it there right this minute. I'm going to want you, given
8 that I have another hearing that has to start, and our
9 defendant is here -- I'd like you to jointly email Brenda a
10 date by which you're going to submit the in camera documents
11 that we talked about.

12 I'm taking under advisement this issue of the polling
13 data so I could think about it and decide which way I want to
14 go or whether I want to call you back in or whether I need an
15 evidentiary hearing on it.

16 How far do defendants want to push the issue? Do you
17 want to bring in your experts? I mean, is the primary basis to
18 get data for your experts or to get information that is -- that
19 you can as exemplar or illustration?

20 So, for example, if I say, you know, the amount of
21 burden that I'm going to put Authenticom through is related to
22 how deeply important this information is to the defendants. Do
23 you want to bring in your experts to testify about why they
24 need this information and how a seven-day sample from 2019 is
25 going to be the be all or end all of their analysis? Do you

1 want to have that?

2 And then do you want me to appoint the special master
3 so you can pay that special master to do this and go off and go
4 on that track? Or do you want to accept some measure, ten or
5 20 of these over a day or two days, and take that for your
6 purposes?

7 I just -- I'm trying to gauge how important this issue
8 is in the grand scheme of things. How much time I should spend
9 on it. How much time you want to spend on it.

10 MR. MacDONALD: Your Honor, we think this issue is
11 very important. We want it for two reasons. One is the
12 illustrative reason you talked about. One is, as I said, one
13 of the elements of our claims is quantifying the number of
14 times they run scripts on our system. And this is one of the,
15 if not the only, source of that information.

16 THE COURT: So you have other sources of information.

17 MR. MacDONALD: There --

18 THE COURT: It is obvious from what you have got here.
19 And so why didn't you, in your motion, wax eloquent on the
20 quantification aspect as opposed to the illustrative aspect?

21 I mean, getting this information from a lot of
22 different ways. You have got Authenticom people testifying
23 about how the fact that they did this on hundreds of occasions.
24 You have got your own systems that can show who -- probably how
25 many times you were hit. You have got other data coming in.

1 So is this another pebble of information? Is it a
2 boulder? Is it outcome determinative?

3 MR. MacDONALD: I don't believe --

4 THE COURT: Or don't you know?

5 MR. MacDONALD: I don't believe it is outcome
6 determinative. But it is a substantial source of information.
7 This is the best information Authenticom keeps on this.

8 THE COURT: It may be the best information that
9 Authenticom keeps on it, but do you have other information that
10 you can prove your case with?

11 MR. MacDONALD: Well, we're going to -- if we don't
12 get this information, we're going to have to prove it with
13 other information. But they are going to challenge that as not
14 reliable. They are going to say your information isn't good
15 enough because you don't have access to the instance-by-
16 instance data, which is only kept on the --

17 THE COURT: Yeah, but they are going to challenge that
18 on a seven-day sample too, right?

19 MR. MacDONALD: That's true. But then we have another
20 pillar to stand on.

21 THE COURT: Okay. So we're talking about how many
22 pillars you need to stand on, right?

23 MR. MacDONALD: Well, you need at least three or four
24 for a chair.

25 THE COURT: Okay. A question whether a pedestal is

1 enough here.

2 Okay. We're going to -- we're going to stop right
3 now. I think I understand where we are.

4 I know I have to set another date to see you. I have
5 other motions under advisement.

6 I think by and large the motions I now continue to
7 have under advisement, pending what you're going to tell me
8 about whether you work out everything on the issues in the
9 agenda, including depositions and stuff like that, are --
10 motions mostly are in camera review, redaction, clawback kind
11 of issues, which are terribly labor intensive. So we would
12 have to set out some time for that.

13 But right now I think, unless there is anything else
14 somebody wants to raise quickly, I think we are going to break.

15 MS. WEDGWORTH: Your Honor, just one brief thing. We
16 have a third-party motion to compel that we briefed in the
17 Southern District of New York, which was transferred here on
18 May 30th. It was assigned to Judge Tharp. So we will be --
19 good news, bad news -- getting it to you, hopefully, this week.
20 So there is a pending motion to compel from a third-party
21 production.

22 THE COURT: Well, that depends on whether Judge Tharp
23 wants to send it over here.

24 MS. WEDGWORTH: Correct, your Honor.

25 THE COURT: I think maybe it should go to Dow and then

1 to me. I don't know.

2 MS. WEDGWORTH: I suspect we have to get it in front
3 of Dow and then to you.

4 THE COURT: Well, it is not yet on my brief motions
5 calendar, so -- okay. Can we break?

6 MR. NEMELKA: We thank you for your time.

7 MS. WEDGWORTH: Thank you, your Honor.

8 MR. HO: Thank you, your Honor.

9 MS. GULLEY: Thank you, your Honor.

10 (Which concluded the proceedings:)

11 CERTIFICATE

12 I HEREBY CERTIFY that the foregoing is a true, correct
13 and complete transcript of the proceedings had at the hearing
14 of the aforementioned cause on the day and date hereof.

15
16 **/s/ Pamela S. Warren**
17 Official Court Reporter
18 United States District Court
Northern District of Illinois
Eastern Division

June 10, 2019
Date

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